Filed 5/31/22 Duncombe v. Barfresh Food Group, Inc. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SCOTT DUNCOMBE, Plaintiff, Cross-defendant and Respondent, v. BARFRESH FOOD GROUP, INC., Defendant, Cross-complainant and Appellant; GIVEMEJUST10 PTY LTD., Cross-defendant and Respondent.	B308385 (Los Angeles County Super. Ct. No. BC626749)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michelle Williams Court, Judge. Affirmed.

Libertas Law Group, Inc., and David J. Scharf for Defendant, Cross-complainant and Appellant.

The Kruger Law Firm, Jackie Rose Kruger and Dawei Chi for Plaintiff, Cross-defendants and Respondents.

This litigation arises out of a contractual dispute between plaintiff, cross-defendant and respondent Scott Duncombe (Duncombe) and defendant, cross-complainant and appellant Barfresh Food Group, Inc. (Barfresh). Following a jury trial, judgment was entered in favor of Duncombe and cross-defendant and respondent Givemejust10 PTY Ltd. (G10) (collectively, Duncombe and G10 are referred to as respondents). Duncombe was thereafter awarded attorney fees, and both respondents were awarded costs. Barfresh appeals, arguing: (1) The trial court lacked subject matter jurisdiction over this dispute; (2) The trial court abused its discretion in awarding Duncombe attorney fees; and (3) The trial court erred in awarding respondents their costs.

We affirm.

FACTUAL BACKGROUND

Barfresh, a California corporation, hired Duncombe to conduct marketing related activities on its behalf in Australia. Pursuant to their agreement, Duncombe provided services to Barfresh and provided invoices on his behalf through a corporate entity, G10. While Barfresh initially paid for Duncombe's services, at some point it stopped providing payments and reimbursements, prompting this litigation.

PROCEDURAL BACKGROUND

Pleadings

On July 12, 2016, Duncombe initiated this action against Barfresh, alleging claims for breach of contract, common count/open book account, and waiting time penalties (Lab. Code, §§ 203, 218.5). Barfresh responded by filing an answer and a cross-complaint against respondents.

Discovery

On April 2, 2018, Duncombe served requests for admission on Barfresh. As is relevant to the issues raised in this appeal, request for admission No. 3 (RFA No. 3) asked Barfresh to admit "that during the October 2014 meeting between [its chief executive officer] and [Duncombe], [it] agreed that [Duncombe] would provide business development, marketing, and consulting services to [Barfresh] in exchange for payments based on [Duncombe's] invoices on a monthly basis." Request for admission No. 4 (RFA No. 4) asked Barfresh to admit that after the October 2014 meeting, Barfresh "negotiated with [Duncombe] via telephonic communications and emailed the terms under which [Duncombe] would provide business development, marketing, and consulting services to [Barfresh] in exchange for payment based on [Duncombe's] invoices on a monthly basis." And request for admission No. 12 (RFA No. 12) asked Barfresh to admit that Duncombe invoiced his "business development, marketing, and consulting services in October 2015."

Barfresh denied RFA Nos. 3, 4 and 12.

Trial

A jury trial was conducted from September 24, 2018, to October 4, 2018, on Duncombe's breach of contract claim[1] and Barfresh's cross-complaint. Ultimately, the jury returned a verdict for Duncombe, awarding him $43,962.56. The jury also found against Barfresh on the cross-complaint.

Motion for Attorney Fees

On December 21, 2018, Duncombe moved for attorney fees. Relying upon Code of Civil Procedure section 2033.420, subdivision (a), he argued that Barfresh's denial of certain requests for admission was unreasonable. Pursuant to the *Laffey* Matrix, he argued that the $492.66 hourly rate requested for his attorney's work was reasonable. And, he requested a multiplier of 2.0. In total, Duncombe requested attorney fees in the amount of $393,945.30.

In support of the motion, Duncombe submitted a declaration from his attorney. She averred that she had been practicing as an attorney for approximately 13 years. She also asserted that her office spent a reasonable number of hours proving Duncombe's case. Her declaration does not set forth her hourly rate; she points out that her office represented Duncombe on a contingency basis.

Barfresh opposed Duncombe's motion, arguing, inter alia, that its denial of RFA Nos. 3, 4 and 12 was reasonable and had no effect on Duncombe's burden of proof. It further argued that

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[1] Prior to trial, Duncombe withdrew his common count. On the first day of trial, Barfresh brought a motion for nonsuit, claiming that the trial court lacked subject matter jurisdiction. At some point thereafter, the trial court dismissed Duncombe's claim for Labor Code violations.

Duncombe's request for a multiplier was unfounded. Notably, Barfresh did not challenge Duncombe's use of the *Laffey* Matrix or argue that the motion was insufficient because it was not supported by an expert declaration.

Memorandum of Costs

On January 23, 2019, respondents each served a memorandum of costs on Barfresh. In part, G10 sought $4,668 in costs for ordinary witness fees (airfare, hotel, and Uber travels) associated with Duncombe's travel from Australia to Los Angeles. Duncombe also requested $4,138.02 in "[o]ther" costs.

All costs requested were awarded and added to the judgment.

Motion to Vacate the Judgment

On August 6, 2019, Barfresh filed a motion to vacate the judgment. In its amended motion filed on January 31, 2020, it argued, among other things, (1) respondents were not entitled to costs because neither Barfresh nor its counsel was ever served with the memorandum of costs, (2) certain costs were improperly awarded, and (3) the judgment was void because the trial court lacked subject matter jurisdiction to enter any judgment since the alleged contract was entered into and performed in Australia.

Respondents opposed Barfresh's motion.

Trial Court Order on Postjudgment Motions

After entertaining oral argument and taking the matter under submission, the trial court denied Barfresh's motion to vacate the judgment and granted Duncombe's motion for attorney fees, awarding him a reduced amount of $38,920.14. Regarding attorney fees, the trial court specifically found that the challenged requests for admission "were of substantial importance because they related to each element of [Duncombe's]

breach of contract claim and would have established a material breach." And, Barfresh's denial of RFA Nos. 3, 4, and 12 was not reasonable, noting that Barfresh "knew that it agreed to compensate [Duncombe] based on invoices even if it also used performance standards to compensate [Duncombe]. [Barfresh] also knew that it exchanged email communications with [Duncombe] to establish that [Duncombe] would submit invoices in order to warrant compensation and that it received [Duncombe's] invoice."

Finally, the trial court ruled: "As [Barfresh] did not file a motion to tax costs, the court directs the clerk to enter an award of costs in the amount of $27,530.30 on the judgment."

Appeal

Barfresh's timely appeal ensued.

DISCUSSION

I. *Alleged void judgment*

Barfresh argues: "Lacking subject matter jurisdiction in this case, the superior court issued a void judgment and thus abused its discretion in denying [B]arfresh's motion to vacate that void judgment." According to Barfresh, the trial court here lacked subject matter jurisdiction over this dispute because "nothing was to be done in California pursuant to the contract except the purely ministerial act of payment by Barfresh."

The California Constitution and statutes confer broad jurisdiction on state courts. (See Cal. Const., art. VI, § 10 [except as otherwise provided, "[s]uperior courts have original jurisdiction in all other causes"]; Code Civ. Proc., § 410.10 ["A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"].)

"The principle of 'subject matter jurisdiction' relates to the inherent authority of the court involved to deal with the case or matter before it. [Citation.]" (*Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1087.) "Clearly, the [Los Angeles] County Superior Court department that heard this case did not lack jurisdiction in any fundamental sense; it was clearly 'competent' and had 'inherent authority' to hear the case, and there were no territorial or other bars to its jurisdiction." (*Harnedy v. Whitty* (2003) 110 Cal.App.4th 1333, 1344.)

Barfresh's argument notwithstanding, *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.* (1934) 292 U.S. 143 and *Home Insurance Co. v. Dick* (1930) 281 U.S. 397 do not compel otherwise. Those cases did not address subject matter jurisdiction. All they recognized was the following: "Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws [citation], it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations." (*Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, *supra*, at p. 150.) Barfresh has not explained how that principle vitiates a California trial court's subject matter jurisdiction.

II. *Attorney fees*

Barfresh argues that the trial court abused its discretion in awarding Duncombe attorney fees.

A. Entitlement to fees

We first consider Barfresh's contention that the trial court erred in awarding attorney fees to Duncombe based upon its denial of certain requests for admission.

1. *Relevant law*

California Code of Civil Procedure section 2033.420 (section 2033.420), provides: "(a) If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. [¶] (b) The court shall make this order unless it finds any of the following: [¶] (1) An objection to the request was sustained or a response to it was waived under Section 2033.290. [¶] (2) The admission sought was of no substantial importance. [¶] (3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter. [¶] (4) There was other good reason for the failure to admit."

"The determination of whether a party is entitled to expenses under [former] section 2033, subdivision (o) is within the sound discretion of the trial court." (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 637, fn. 10.) "More specifically, '[former] section 2033, subdivision (o) clearly vests in the trial judge the authority to determine whether the party propounding the admission thereafter proved the truth of the matter which was denied.' [Citation.] An abuse of discretion occurs only where it is shown that the trial court exceeded the bounds of reason. [Citation.] It is a deferential standard of review that requires us to uphold the trial court's determination, even if we disagree with

it, so long as it is reasonable. [Citation.]" (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864 (*Stull*).)[2]

"Requests for admissions differ fundamentally from other forms of discovery. Rather than seeking to uncover information, they seek to eliminate the need for proof. [Citation.] It reasonably follows that the aims of the statutes are different.

"'The primary purpose of requests for admissions is to set at rest triable issues so that they will not have to be tried; they are aimed at expediting trial. [Citation.] The basis for imposing sanctions . . . is directly related to that purpose. Unlike other discovery sanctions, an award of expenses . . . is not a penalty. Instead, it is designed to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission . . . [citations] such that trial would have been expedited or shortened if the request had been admitted.' [Citations.]" (*Stull*, *supra*, 92 Cal.App.4th at pp. 864–865.)

2. *Analysis*

Applying these legal principles, we conclude that the trial court acted well within its discretion when it determined that Duncombe was entitled to recoup a reduced amount of attorney fees incurred in proving the truth of the requested admissions. The trial court specifically found RFA Nos. 3, 4, and 12 "of substantial importance because they [were] related to each element of [Duncombe's] breach of contract claim and would have established a material breach." And, it found that Barfresh's "denials and/or objections" to those requests for admission were

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[2] In its reply brief, Barfresh insists that we review this issue de novo (although it does curiously argue that the trial court's ruling was an abuse of discretion). The cases cited in support are readily distinguishable as they do not involve section 2033.420.

unreasonable as Barfresh "knew that it agreed to compensate [Duncombe] based on invoices" and "knew that it exchanged email communications with [Duncombe] to establish that [Duncombe] would submit invoices in order to warrant compensation." Given that these were key issues in Duncombe's breach of contract claim against Barfresh, the trial court acted well within its discretion in finding Barfresh's denials unreasonable.

Urging us to reverse, Barfresh asserts that it never denied the existence of an enforceable contract and that Duncombe knew "perfectly well" from the beginning that Barfresh would be admitting at trial that the contract existed. There are at least two problems with this argument. First, the challenged requests for admission did not ask Barfresh to admit that a contract existed. Rather, they asked Barfresh to admit the terms of that contract and how Duncombe would be paid. And RFA No. 12 asked Barfresh to admit that Duncombe invoiced it. To the extent Barfresh attempts to recharacterize the requests for admission and/or the trial court's assessment of those discovery requests in support of its contention that its denials were reasonable, its efforts fail. (*Stull*, *supra*, 92 Cal.App.4th at p. 864.)

Second, even if those requests for admission simply asked Barfresh to admit that it had a contract with Duncombe, we wonder why Barfresh denied RFA Nos. 3, 4, and 12.

Under these circumstances, we conclude that Barfresh has not demonstrated how the trial court acted outside the scope of its discretion in finding Barfresh's denial of these requests unreasonable.

B. Amount of attorney fees

Having determined that the trial court acted within its discretion in awarding Duncombe attorney fees, we next consider Barfresh's challenge to the amount of attorney fees awarded.

1. *Standard of review*

We review an order granting or denying attorney fees, as well as the amount of a fee award, for abuse of discretion. (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 148.) After all, "'[t]he "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong"'—meaning that it abused its discretion." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

"'An abuse of discretion occurs only where it is shown that the trial court exceeded the bounds of reason. [Citation.] It is a deferential standard of review that requires us to uphold the trial court's determination, even if we disagree with it, so long as it is reasonable. [Citation.]'" (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 753.) "We will reverse the trial court's determination only if we find that 'in light of all the evidence viewed most favorably in support of the trial court, no judge could have reasonably reached a similar result.'" (*Bates v. Presbyterian Intercommunity Hospital, Inc.* (2012) 204 Cal.App.4th 210, 221.) In other words, "[w]e presume the fee approved by the trial court is reasonable." (*Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 743.)

The burden is on the party seeking attorney fees to prove that the fees it seeks are reasonable. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 98.) It is also the

appealing party's burden to prove that the trial court abused its discretion. (*Ibid*.)

2. *Relevant law*

The fee setting inquiry in California ordinarily begins with the "lodestar," namely the number of hours reasonably expended multiplied by the reasonable hourly rate. (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095.) "'After the trial court has performed the calculations [of the lodestar], it shall consider whether the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so, shall reduce the [Civil Code] section 1717 award so that it is a reasonable figure.'" (*PLCM Group, Inc. v. Drexler,* at pp. 1095–1096.) In determining "reasonable" compensation, trial courts must carefully review attorney documentation of hours expended; "'padding'" in the form of inefficient or duplicative efforts is not subject to compensation. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.)

In adjusting the lodestar figure, the trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances of the case. (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623–624.) Our Supreme Court has never "carved the factors used [to calculate the lodestar] into concrete or barred consideration of other relevant and nonduplicative factors; nor have the courts of appeal sought to do so." (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 40, fns. omitted.)

The value of legal services performed in a case is a matter in which the trial court has its own expertise. (*Melnyk v. Robledo, supra,* 64 Cal.App.3d at p. 623.)

C. Analysis

Applying these legal principles, we conclude that the trial court did not err in awarding Duncombe attorney fees in the reduced amount of $38,920.14. In reaching this result, the trial court succinctly summarized the relevant law concerning the lodestar method and the trial court's ability to make its own evaluation of the reasonableness of the work done and of the credibility of the moving party's counsel's declaration. It then awarded Duncombe a substantially reduced amount from Duncombe's request of $393,945.30.

Urging us to reverse, Barfresh asserts that the supporting declaration of Duncombe's counsel was insufficient because it was not supported by expert opinion or admissible evidence regarding an appropriate billing rate. This argument fails for at least two reasons. First, Barfresh did not preserve this argument for appeal as it did not raise this argument below. (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799–800.) Second, Barfresh ignores the authority of the trial court to "make its own evaluation of the reasonable worth of the work done in light of the nature of the case, and of the credibility of counsel's declaration," and "we do not reweigh the evidence." (*Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1587.)

Barfresh further asserts that the trial court erred in allowing Duncombe and his counsel to use the *Laffey* Matrix. Again, as Barfresh did not raise this objection below, it has been forfeited on appeal. (*Dietz v. Meisenheimer & Herron*, *supra*, 177 Cal.App.4th at pp. 799–800.)

Setting aside this procedural obstacle, Barfresh's argument fails on the merits. "The *Laffey* Matrix is a United States Department of Justice billing matrix that provides billing rates for attorneys at various experience levels in the Washington, D.C., area and can be adjusted to establish comparable billing rates in other areas using data from the United States Bureau of Labor Statistics. [Citations.]" (*Pasternack v. McCullough* (2021) 65 Cal.App.5th 1050, 1057, fn. 5.) California courts have allowed attorneys to rely upon the *Laffey* Matrix when seeking attorney fees. (See, e.g., *Pasternack v. McCullough*, *supra*, at pp. 1056–1057; *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 702–703.) Barfresh offers no reason for Duncombe and his counsel to be precluded from using the *Laffey* Matrix.

III. *Costs*

Barfresh challenges the trial court's award of certain costs.

"Generally, the standard of review of an award of costs is whether the trial court abused its discretion in making the award. [Citation.] However, when the issue to be determined is whether the criteria for an award of costs have been satisfied, and that issue requires statutory construction, it presents a question of law requiring de novo review." (*Berkeley Cement, Inc. v. Regents of University of California* (2019) 30 Cal.App.5th 1133, 1139.)

It is undisputed that Barfresh failed to file a motion to tax costs. "The 'failure to file a motion to tax costs constitutes a waiver of the right to object. [Citations.]' [Citation.]" (*Douglas v. Willis* (1994) 27 Cal.App.4th 287, 289–290; see also Cal. Rules of Court, rule 3.1700(b).) Thus, we need not consider Barfresh's arguments on appeal.

Urging us to reverse, Barfresh asserts that because it was never properly served with either memorandum of costs, it did not need to file a motion to tax costs in order to preserve its objections. But, substantial evidence supports the trial court's finding that Barfresh was properly served with a memorandum of costs from each respondent. The facts that (1) the memoranda of costs were not also served by e-mail, and (2) Barfresh's counsel denies receipt of the memoranda do not compel reversal. (*Goodman v. Community Savings & Loan Assn.* (1966) 246 Cal.App.2d 13, 22–23 [appellate court does not reweigh evidence or pass on witness credibility; if there is any substantial evidence to support the trial court's finding, taking into account all inferences that the trial court might reasonably have drawn to support its determination, its finding is conclusive].)

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ